UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE AIR FORCE 6TH AIR MOBILITY WING MACDILL AIR FORCE BASE MACDILL AFB, FLORIDA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 153 Charging Party	Case No. AT-CA-01-0851

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his/her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **DECEMBER 9, 2002**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, N.W., Suite 415
Washington, D.C. 20424

PAUL B. LANG
Administrative Law Judge

Dated: November 7, 2002
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: November 7, 2002

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE
6TH AIR MOBILITY WING
MACDILL AIR FORCE BASE
MACDILL AFB, FLORIDA

Respondent

and Case No. AT-CA-01-0851

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 153

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 03-02
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE 6TH AIR MOBILITY WING MACDILL AIR FORCE BASE MACDILL AFB, FLORIDA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 153 Charging Party	Case No. AT-CA-01-0851

Major Troy Holroyd, Esquire
For the Respondent

Donald Bendever, Chief Steward
For the Charging Party

Richard S. Jones, Esquire
For the General Counsel

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an Unfair Labor Practice charge filed by the American Federation of Government Employees, Local 153 (the Union), against the Department of the Air Force, 6th Air Mobility Wing, MacDill Air Force Base, MacDill AFB, Florida (the Respondent), on September 24, 2001. On July 16, 2002, the Regional Director of the Atlanta Region, Federal Labor Relations Authority issued a Complaint and Notice of Hearing alleging that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), by failing to comply with

an Arbitrator's award in which the Respondent was directed to reinstate Ronald Cherrier, a member of the bargaining unit.

A hearing was held before the undersigned Administrative Law Judge in Tampa, Florida on September 18, 2002. The parties were represented by counsel and afforded an opportunity to present evidence and cross-examine witnesses. This Decision is based upon consideration of all evidence at the hearing and demeanor of the witnesses. The General Counsel and Respondent filed timely post-hearing briefs.

Positions of the Parties

The General Counsel maintains that the Respondent did not make a reasonable and good faith effort to reinstate Cherrier inasmuch as it limited its exploration of employment opportunities to the Avon Park Bombing Range (Avon Park), where Cherrier had been employed, rather than including positions available at MacDill Air Force Base (MacDill). The General Counsel further states that, rather than conducting a thorough search for appropriate positions, the Respondent merely conducted sporadic reviews of vacancies and improperly eliminated a number of positions which were suitable for Cherrier. The requested remedy includes the retroactive reinstatement of Cherrier, including backpay with interest, as of September 3, 2001. The back pay should be calculated at the rate of pay which Cherrier was receiving as of the time of his termination.

The Respondent maintains that it made a reasonable and good faith effort to comply with the award. Cherrier was not entitled to be assigned to a position at MacDill because it was in a different commuting area than Avon Park. Furthermore, there were no available positions with duties identical or similar to those Cherrier actually performed immediately prior to the termination of his employment.

The Respondent maintains that the arbitration award was ambiguous with regard to two aspects of the remedy. The first was with regard to the length of time during which the Respondent was obligated to attempt to find a job for Cherrier. The second was whether he was entitled to consideration for positions at MacDill as well as Avon Park. The Respondent construed the award as only requiring it to attempt to place Cherrier in a position at Avon Park within two pay periods of the date on which the award became final. The Respondent's construction of the award, although perhaps debatable, was reasonable, thus satisfying its obligation to comply.

Findings of Fact

On February 4, 2000, Cherrier, who was employed at Avon Park as a firefighter, submitted a urine sample for a mandatory drug test. The sample tested positive; Cherrier was removed from his position as a firefighter and was temporarily assigned to the Target Maintenance section at Avon Park pending a decision as to further disciplinary action. On May 19, 2000, Cherrier's employment was terminated because of the results of the drug test.

The Union filed a grievance on Cherrier's behalf and eventually submitted the grievance to arbitration. On August 3, 2001, the Arbitrator issued a decision in which he upheld Cherrier's removal from the firefighter position. However, the Arbitrator also ruled that Cherrier should not have been terminated because the Respondent had not fully complied with pertinent provisions of the collective bargaining agreement. Both the Union and the Respondent requested clarification of the award. That clarification was contained in a letter from the Arbitrator dated September 5, 2001. The letter stated, in pertinent part, that:

> a. As soon as practical, but no later than two pay periods Cherrier was to be reinstated to a position similar to that which he occupied immediately prior to his termination. The Arbitrator referred to evidence submitted at the hearing which, "strongly suggested that he performed needed work on a Civil Engineering position immediately before his removal from the service and following his removal from his Firefighter/Driver Operator position. Consequently, he is to be placed on [sic] that position, or the position which more closely reflects the duties actually performed."
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> b. Cherrier was to be paid according to the pay grade commensurate with the duties actually performed immediately prior to his termination unless applicable regulations required that he be paid at the GS-06 rate which was applicable to his position as a firefighter and at which he was paid while in the temporary position prior to his termination.

The clarification letter did not alter the provisions of the original award to the effect that Cherrier was not entitled to backpay for the period between May 19, 2000 and

the date of his reinstatement.[1] Neither the award nor the letter of clarification set a time limit on the Respondent's duty to attempt to find a new job for Cherrier, nor did it specify whether he was to be considered for vacancies at MacDill as well as Avon Park.[2]

By letter dated September 7, 2001, the Union informed the Respondent that, pursuant to the arbitration award, Cherrier voluntarily requested assignment to any full time position either at Avon Park or MacDill. Cherrier would be willing to relocate from Avon Park to MacDill at his own expense if given a reasonable amount of time to do so.

Neither the Union nor the Respondent requested that the arbitration award be reviewed.[3] In spite of Cherrier's stated willingness to accept employment at either of the two locations, he has not been reinstated by the Respondent.

Discussion and Analysis

The Legal Standard

In determining the adequacy of compliance with an arbitration award, the Authority must determine whether the Respondent's construction of the award is reasonable. Such a determination depends upon whether the construction is consistent with the entire award and with applicable rules and regulations. However, in construing the award, the Authority is not empowered to either review or modify it. In other words, the Authority may not substitute its judgment for that of the Arbitrator or rule on matters that the arbitrator failed to address. *See Oklahoma City Air Logistics Center, Oklahoma City, Oklahoma*, 46 FLRA 862, 868

[1] The award also required Cherrier to enroll in a drug treatment and rehabilitation program and to submit to random drug testing. Questions as to employee benefits and length of service were to be dealt with in accordance with applicable regulations.

[2] It is undisputed that the bargaining unit encompasses both locations.

[3] In view of the fact that the award involves a removal, which is an action covered by 5 U.S.C. § 7512, it could not have been reviewed by the Authority. Instead, pursuant to §7121 (f) of the Statute, the Director of the Office of Personnel Management could have sought judicial review in the same manner as if she were seeking review of a decision of the Merit Systems Protection Board. There is no evidence that either party requested that the Director take such action.

(1992). Furthermore, a determination as to whether the Respondent has adequately complied with the award depends upon the clarity of the Arbitrator's ruling. *See U.S. Department of the Treasury, Internal Revenue Service, Austin Compliance Center, Austin, Texas*, 44 FLRA 1306, 1315 (1992).

When an agency disregards or changes portions of the award, it has failed to comply as required by §7122(b) of the Statute. *U.S. Department of the Air Force, Carswell Air Force Base, Texas*, 38 FLRA 99, 104 (1990).

The Adequacy of the Respondent's Compliance

An examination of the arbitration award indicates that it is not so much ambiguous as inartfully worded. In describing the Respondent's obligation to reinstate Cherrier, the Arbitrator stated in the letter of clarification dated September 5, 2001 (Joint Exhibit 5), that he was to be placed in a position which was:

> *similar* to that occupied immediately before his removal from the service. The evidence and testimony at the Hearing strongly suggested that he performed needed work on a Civil Engineering position immediately before his removal from the service and following his removal from his Firefighter/Driver Operator position. Consequently, he is to be placed on that position, *or the position which more closely reflects the duties actually performed.* (Emphasis added).

The Arbitrator went on to define the limit of the Respondent's duty as follows:

> Such placement on such a position is dependent on a vacancy and the need to perform the work involved, as determined by Agency Management under the provisions of Article 4 of the Memorandum of Agreement.[4]

While the above language may be somewhat vague, there can be no legitimate question that Cherrier was to be reinstated as soon as practical, but no later than two pay

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[4] Article 4, entitled Management Rights, preserves the authority of Respondent's management representatives to establish the organization of the Respondent and to make decisions on actions such as hiring and firing.

periods following receipt of the award.[5] The Respondent maintains that its obligation to search for a suitable position for Cherrier was limited to two pay periods. That contention is diametrically opposite to the plain meaning of the award. The Arbitrator clearly meant to establish a deadline for the restoration of Cherrier's employment. Yet, the Respondent has interpreted that deadline as a limitation of Cherrier's right to reinstatement rather than the guideline for the timeliness of its compliance with the award.

In view of the precisely stated deadline for Cherrier's reinstatement, the lack of clarity of certain other portions of the award is largely moot within the context of this case. The exact nature of the positions to which Cherrier is entitled will become relevant only if he declines a position which is offered by the Respondent or if he is refused a position for which the Respondent declares him to be ineligible.[6] Unless and until such contingencies occur, Cherrier is entitled to backpay in lieu of reinstatement.

The Arbitrator did not set a time limit to Cherrier's entitlement to backpay. However, that issue, like the nature of the positions for which Cherrier is eligible, is not ripe for adjudication in view of the fact that the Respondent has not yet begun to adequately comply with the arbitration award.

The question as to whether Cherrier may be reinstated to a position at MacDill as well as Avon Park has been resolved by his stated willingness to accept a position at either location. Although section 12.3 of the collective bargaining agreement allows an employee to refuse an assignment outside of his commuting area, Cherrier's flexibility has the effect of easing the Respondent's burden inasmuch as it expands the geographic area within which the Respondent may search in order to satisfy its obligation under the arbitration award.

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[5] In response to the Union's request for clarification, the Arbitrator stated that paragraph 4 of the original award contained a typographical error and that Cherrier was to be reinstated within two pay periods rather than two weeks as originally stated. The Respondent did not request clarification of the deadline for Cherrier's reinstatement.

[6] Although the General Counsel has suggested that Cherrier could have been placed in certain positions that were reserved for other employees, there is insufficient evidence to prove that point.

The Remedy

The General Counsel has proposed a remedy which would include the requirement that the Respondent make Cherrier whole by retroactively reinstating him, with backpay and interest as of September 3, 2001, at the rate of pay he was earning as of the date of his removal. That proposal is

inconsistent with the arbitration award. In the first

place, the Arbitrator issued his letter of clarification on September 5, 2001.[7]

With regard to the rate of pay, the Arbitrator indicated that Cherrier should receive backpay at the GS-06 rate, which he continued to receive after his removal from the Firefighter/Driver Operator position, only if required by applicable regulations. Otherwise, Cherrier is to receive backpay at a pay grade commensurate with the duties actually performed in his temporary position. The Authority is not empowered to resolve the issue of back pay when the Arbitrator has not done so. It is to be hoped that the parties will be able to reach an accommodation which is consistent with the terms of the arbitration award.[8]

For the reasons set forth above, I have found that the Respondent violated §§7116(a)(1) and (8), 7121 and 7122 by failing to properly implement the arbitration award in FMCS Case No. 01-02679. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, IT IS HEREBY ORDERED that, the Department of the Air Force, 6th Air Mobility Wing, MacDill Air Force Base, MacDill AFB, Florida, shall:

· Cease and desist from:

(a) Failing and refusing to abide by and implement the final and binding award of Arbitrator Thomas K. Goldie in FMCS Case No. 01-02679.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise

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[7] Although the Arbitrator indicated that back pay would not commence until after the Respondent had completed its efforts to obtain a review of the award, there is no evidence that such efforts were made.

[8] Apparently neither the Arbitrator, the Union nor Cherrier were aware that Cherrier had been temporarily detailed to a position as a Tractor Operator, GS-06, after his removal from the fire fighter position. There is nothing to suggest that the Arbitrator would have made a different award if he had known of the detail. However, the detail may have an impact on the pay rate for back pay.

of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Comply with the final and binding award of Arbitrator Thomas K. Goldie in FMCS Case No. 01-02679 by reinstating Ronald L. Cherrier to a position with duties identical or similar to the duties he performed immediately prior to his removal from employment. Reinstatement is to be retroactive to February 5, 2001, along with backpay and interest, at a rate of pay commensurate with the duties actually performed by Ronald L. Cherrier immediately prior to his removal from employment or at the rate of pay at which he was actually paid if required by applicable regulations.

(b) Post at MacDill Air Force Base and Avon Park Bombing Range, where bargaining unit employees represented by the American Federation of Government Employees, Local 153 are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Base Commander, and shall be posted and maintained for 60 consecutive days in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority’s Rules

and Regulations, notify the Regional Director, Atlanta Region, Federal Labor Relations Authority in writing, within 30 days of the date of this Order as to what steps have been taken to comply.

Issued, Washington, DC, November 7, 2002.

PAUL B. LANG
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Air Force, 6th Air Mobility Wing, MacDill Air Force Base, MacDill AFB, Florida, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to abide by and implement the final and binding award of Arbitrator Thomas K. Goldie in FMCS Case No. 01-02679.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL comply with the final and binding award of Arbitrator Thomas K. Goldie in FMCS Case No. 01-02679 by reinstating Ronald L. Cherrier to a position with duties identical or similar to the duties he performed immediately prior to his removal from employment. Reinstatement is to be retroactive to February 5, 2001, along with back pay and interest, at a rate of pay commensurate with the duties actually performed by Ronald L. Cherrier immediately prior to his removal from employment or at the rate of pay at which he was actually paid if required by applicable regulations.

_____
(Respondent/Activity)

Date:_____By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.
If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Atlanta Regional

Office, Federal Labor Relations Authority, whose address is: Marquis Two Tower, 285 Peachtree Center Avenue NE, Suite 701, Atlanta, Georgia 30303, and whose telephone number is: (404)331-5380.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by PAUL B. LANG, Administrative Law Judge, in Case No. AT-CA-01-0851, were sent to the following parties:

CERTIFIED MAIL: **CERTIFIED NOS:**

Richard S. Jones, Esquire
7000-1670-0000-1175-6681
Federal Labor Relations Authority
Marquis Two Tower, Suite 701
285 Peachtree Center Avenue, NE
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Major Troy Holroyd, Esquire
7000-1670-0000-1175-6698
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MacDill AFB, FL 33608

REGULAR MAIL:

President
AFGE, AFL-CIO
80 "F" Street, N.W.
Washington, DC 20001

_____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: NOVEMBER 7, 2002

WASHINGTON, DC